

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Protecting and Promoting the Open Internet

GN Docket No. 14-28

**REPLY COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
(CCIA)**

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SUMMARY

CCIA continues to support clear, meaningful, and enforceable Open Internet rules. Its Initial Comments fully addressed the statutory basis and need for these rules, as well as providing specific recommendations for the No-Blocking, No-Discrimination, and Transparency Rules that the Commission has proposed. CCIA also discussed the need to apply the rules as broadly as possible and to enforce them in a way that provides both certainty and meaningful redress for both businesses and consumers.

In these Reply Comments, CCIA addresses arguments that either misstate, or ignore altogether, the realities of the broadband Internet market and the two decisions by the D.C. Circuit that form the parameters of the Commission's authority in this proceeding. We also highlight the broad support that the record displays for stringent No-Blocking and No-Discrimination Rules.

In brief, the indisputable evidence of improper BIAP conduct, combined with the plain language of the Communications Act and the thorough analysis contained in the *Verizon* decision, demonstrate that the Commission should adopt a No-Blocking Rule and a No-Discrimination Rule that will prohibit individualized agreements and paid prioritization where they are the product of unfair dealing, degraded service, or extraction of "tolls" from entities that provide content, platforms, and applications that American consumers wish to obtain from the Internet.

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The Computer & Communications Industry Association (“CCIA”), by and through counsel, files these Reply Comments in response to the Notice of Proposed Rulemaking released May 15, 2014, in this docket.¹ CCIA focuses here on the assertions that Broadband Internet Access Providers (“BIAPs”) have made regarding the Commission’s authority and basis for the proposed rules, demonstrating that both sound legal analysis and the majority of commenting parties disprove those assertions.

I. THE RECORD DEMONSTRATES THAT AMERICA NEEDS OPEN INTERNET RULES

In its Initial Comments, CCIA demonstrated that BIAPs have both the ability² and the incentive³ to manipulate Internet traffic. CCIA cited the Netflix experience as recent, measurable proof that Comcast and Verizon actually have impeded end user access to Internet content.⁴ Like CCIA, NTCA has pointed to the Comcast-Verizon-Netflix fight, warning that “their dispute must serve as a warning that the lack of clear ‘rules of the road’ and a regulatory backstop governing interconnection and exchange of data in an IP world can threaten enduring value of universal service, public safety, competition and consumer protection.”⁵

¹ GN Docket No. 14-28, *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, FCC 14-61 (rel. May 15, 2014) (“NPRM”). The Wireline Competition Bureau extended the date for Reply Comments in DA 14-1199 (Aug. 15, 2014).

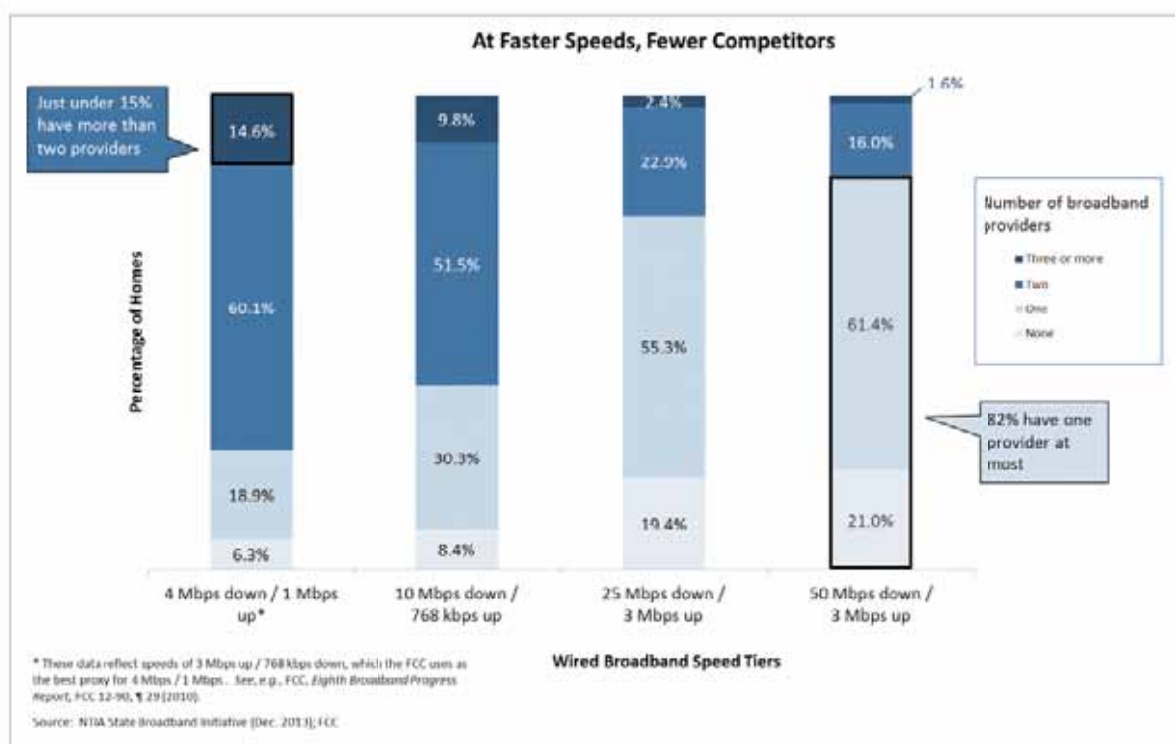
² GN Docket No. 14-28, CCIA Comments at 2 (July 15, 2014).

³ CCIA Comments at 3.

⁴ *Id.* 2 (citing “Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion” (June 13, 2014), *available at* <http://www.fcc.gov/document/chairman-statement-broadband-consumers-and-internet-congestion>; Victor Luckerson, “Everything You Need to Know About the Netflix-Verizon Smackdown,” *TIME* (June 6, 2014), *available at* <http://time.com/#2838570/verizon-netflix-feud-streaming-speeds/>)).

⁵ GN Docket No. 14-28, Comments of NTCA – The Rural Broadband Association a 6 (July 17, 2014).

CCIA also noted the alarming lack of competition in broadband Internet access service,⁶ a topic on which Chairman Wheeler spent a good deal of time in recent public remarks.⁷ He made great use of this chart:



Chairman Wheeler seemed alarmed by the fact that, at “4 Mbps and 10 Mbps, the majority of Americans have a choice of only two providers. That is what economists call a ‘duopoly’, a marketplace that is typically characterized by less than vibrant competition.”⁸ He went on to note that to say “two ‘competitors’ overstates the case,” because consumers “face high

⁶ CCIA Comments at 3 (citing *Internet Access Services: Status as of June 30, 2013*, Figures 1, 5a, and 5b, Industry Analysis and Technology Division, Wireline Competition Bureau (rel. June 25, 2014) (“2014 Internet Access Services Report”), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-327829A1.doc.

⁷ “The Facts and Future of Broadband Competition” (Sept. 4, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf.

⁸ *Id.* at 4.

switching costs that include early-termination fees, and equipment rental fees” which are, in his words, “disincentives to competition.”⁹ For higher throughput, the Chairman observed, choice declines further: “At 25 Mbps, there is simply no competitive choice for most Americans ... Things only get worse as you move to 50 Mbps where 82 percent of consumers lack a choice.”¹⁰ The Chairman considers 25 Mbps “‘table stakes’ in 21st Century communications” – the minimum throughput that consumers need for today’s content and applications.¹¹

Commenters already knew that the competitive landscape for broadband Internet access is bleak and that BIAPs have tremendous power over their subscribers.¹² For these reasons, the record resoundingly calls for adoption of meaningful, enforceable Open Internet rules. From innovative online education providers,¹³ to consumer advocates,¹⁴ to small business owners in real estate,¹⁵ to large American corporate telecom customers from diverse industry sectors,¹⁶ to the

⁹ *Id.* at 4.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 3.

¹² CCIA noted that broadband service carries a “terminating access monopoly” by which “the BIAP fully controls the end user’s Internet access.” CCIA Comments at 4.

¹³ *See generally* GN Docket No. 14-28, Comments of General Assembly (July 17, 2014); Comments of Codecademy (June 23, 2014, filed July 17, 2014); Comments of CodeCombat (June 23, 2014, filed July 17, 2014); Comments of Open Curriculum (July 18, 2014). These parties explain that the absence of meaningful Open Internet rules will harm online education by greatly burdening the user experience by permitting transmission degradation and thus enabling fewer participants in STEM education.

¹⁴ GN Docket No. 14-28, Comments of Consumer Federation of America at 2 (July 15, 2014) (“To preserve the Internet innovation system, the FCC must adopt a regulatory system that prevents unregulated action by communications network owners from undermining or weakening the ‘virtuous cycle.’”).

¹⁵ GN Docket No. 14-28, Notice of *Ex Parte*, National Association of Realtors, *et al.* (May 9, 2014).

Attorneys General of New York and Illinois,¹⁷ commenting parties urge the Commission to recognize that the time to act is now. The unencumbered, seamless characteristics of Internet transmission “have propelled the Internet from a tiny government research project into the world’s most important platform for innovation, commerce, and social change.”¹⁸ The nation’s oligopoly of BIAPs can undo that evolution and destroy that platform if the FCC does not prevent it. According to “the Commission’s analysis,” Free Press wrote, “the market alone will not act to preserve the open and nondiscriminatory outcomes our country needs.”¹⁹

In the face of this evidence, Comcast’s continued protestations that “openness and pro-consumer practices have consistently flourished”²⁰ ring false. Likewise, AT&T’s plea for “preserving the status quo”²¹ is suspect. The status quo is devoid of any meaningful rules, with the

¹⁶ The Ad Hoc Telecommunications Users Committee, *see infra* at 6 & n. 29, is comprised of “a broad array of industries in the national economy, including financial services, automotive, manufacturing, insurance, aerospace, package delivery, information technology, and transportation/logistics.” GN Docket 09-191, *Preserving the Open Internet*, Comments of the Ad Hoc Telecommunications Users Committee at 2 (Jan. 14, 2010).

¹⁷ GN Docket No. 14-28, Comments of New York Attorney General Eric Schneiderman and Illinois Attorney General Lisa Madigan (July 15, 2014); *see also* Comments of Vermont Attorney General William Sorrell (July 18, 2014).

¹⁸ Schneiderman, *et al.* Letter at 1.

¹⁹ GN Docket No. 14-28, Comments of Free Press at 26 (July 17, 2014).

²⁰ GN Docket No. 14-28, Comments of Comcast Corporation at 11 (July 15, 2014). Comcast’s general intransigence against open Internet protections is obvious – it will not even agree to the sensible improvements to the Transparency Rule that the NPRM has proposed. *Id.* at 15-16. CCIA supports those improvements as a useful tool for consumer protection. CCIA Comments at 21-22.

²¹ GN Docket No. 14-28, Comments of AT&T Services, Inc. at 7 (July 15, 2014).

D.C. Circuit having vacated most of the prior order, and that void has proved very injurious to both edge providers and consumers.²²

The Commission demonstrably is aware in the NPRM that “Internet openness”²³ is in danger, and the record only underscores that conclusion. Clear rules prohibiting blocking, discrimination, and misleading disclosures must be adopted now.

II. THE RECORD SUPPORTS APPLICATION OF TITLE II TO BROADBAND INTERNET ACCESS SERVICE, AND ARGUMENTS TO THE CONTRARY ARE HOLLOW

As CCIA demonstrated once again in its Initial Comments, “[t]he Commission’s best source of legal authority to accomplish its goals in this proceeding is the Title II telecommunications framework.”²⁴ Commenters agree.²⁵

A. The Record Contains Forceful Analysis, Grounded in the Act and Commission Policy, Proving that the Transmission Component of Broadband Internet Access Service is Title II Telecommunications

The Communications Act states that the path by which content is transmitted is “telecommunications.”²⁶ The fundamental nature of broadband Internet access as simply a two-way transmission path cannot be ignored. As Public Knowledge argued,

²² CCIA Comments at 2 (discussing Commission investigation into agreements Netflix signed with Comcast and Verizon after end user access was demonstrably compromised); *see also* GN Docket No. 14-28, Comments of Netflix at 12-15 (July 15, 2014) (discussing same).

²³ NPRM ¶ 44.

²⁴ CCIA Comments at 5; *see also* GN Docket No. 09-191, *Preserving the Open Internet*, Reply Comments of CCIA at 10-13 (Mar. 5, 2010).

²⁵ GN Docket No. 14-28, Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband at 4-12 (July 15, 2014); Free Press Comments at 12-16; Comments of i2Coalition at 11 (July 15, 2014); Comments of CompTel at 2 (July 15, 2014); Comments of the National Association of State Utility Consumer Advocates at 7 (July 15, 2014); Comments of AARP at 40 (July 17, 2014); Comments of New America Foundation and Benton Foundation at 22 (July 17, 2014); NTCA Comments at 8.

²⁶ CCIA Comments at 5-6 (quoting 47 U.S.C. § 153(30)).

[B]roadband access providers offer to transmit data of the end user's choosing from the end user's device to another device also connected to the internet. An analysis of today's market shows that providers offer broadband access service "indifferently, *i.e.*, without making 'individualized decisions ... whether and on what terms to deal,'" and to such classes of the general public as they can offer. Accordingly, the Commission should treat this offering as a telecommunications service under Title II.²⁷

Free Press laid it out even more simply:

A broadband access provider performs one main function: transmitting Internet Protocol (IP) packets between the addresses of the user's choosing When a user connects a computing device to her broadband access network, she is able to send information in the IP format to any other computer connected to the Internet. The carrier (and those it interconnects with) looks at the IP packets' address headers and routes them on their way **What exactly is inextricably intertwined in this transmission?**²⁸

The Ad Hoc Telecommunications Users Committee also came out forcefully for Title II classification, providing a detailed chronology of the Internet's development which shows that the transmission component of broadband service is indeed telecommunications:

In today's world, customers obtain Internet access service on an entirely separate basis from web hosting, web browsers, applications, "newsgroup" services, customer premise equipment (which now includes highly sophisticated hardware and software), email servers, etc. While ISPs are free to offer those functionalities as well, they are no longer "inextricably intertwined" with Internet access to create an information service.²⁹

For this reason, the Ad Hoc Committee concluded,

[T]he Commission's earlier rationale for classifying Internet access

²⁷ GN Docket No. 14-28, Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband at 62-63 (July 15, 2014) (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)) (internal citation omitted).

²⁸ Free Press Comments at 68-69 (emphasis added).

²⁹ GN Docket No. 14-28, Comments of the Ad Hoc Telecommunications Users Committee at 6 (July 18, 2014).

service as an unregulated “information service” no longer matches the reality on the ground.³⁰

The major BIAPs have no persuasive response to this analysis. Being unable to find support in the plain language of the Communications Act, they resort to optics and baseless foretellings of doom. AT&T asks the Commission to base its decision on the supposition that “from an end user’s perspective, the transmission component is inextricably intertwined with information-processing capabilities.”³¹ The lay consumer’s understanding of the Internet, however, cannot absolve BIAPs of responsibility, nor does it convert transmission into content. The assertion is simply inapposite, if not silly.

AT&T also portends that “Title II regulation would stifle broadband investment.”³² Verizon similarly asserts that application of Title II “would be harmful, casting a regulatory pall over virtually the entire Internet ecosystem.”³³ These carriers’ threats to cease investing have proven false in the past, as Free Press demonstrated with clear data: telecom carriers spent, on average, **55% more** on investment during the period that broadband was deemed a Title II service, and the cable industry spent **250% more** on cable modem-related deployment prior to the FCC’s ruling that the service falls under Title I.³⁴

Moreover, as CCIA has noted, some of the most innovative and successful online services, including AOL, Amazon, Yahoo!, eBay and Google were launched within a legal and regulatory framework of nondiscriminatory Title II telecommunications networks many years

³⁰ Ad Hoc Committee Comments at 7.

³¹ AT&T Comments at 47.

³² *Id.* at 39.

³³ GN Docket No. 14-28, Comments of Verizon and Verizon Wireless and 46 (July 15, 2014); *see also* Comments of the National Cable & Telecommunications Ass’n at 18 (July 15, 2014).

³⁴ Free Press Comments at 6.

before the FCC reclassified the transmission portion of Internet access as an unregulated information service. Innovation ran free under Title II, safe in the knowledge that the principles of nondiscriminatory interconnection and traffic exchange applied. These protections in no way inhibited the incumbents from investing in the network.

Actually, it is the “uncertainty” of the proposed rules as written in the NPRM that the BIAPs fear.³⁵ So does CCIA.³⁶ The answer, then, is not to fail once again to classify broadband Internet access appropriately, but rather to employ Title II in a manner that results in Open Internet rules that everyone understands and the Commission can enforce. And in light of the D.C. Circuit’s very thorough opinion in *Verizon*,³⁷ meaningful action must begin with Title II.

Commenters thus have been very clear that Title II applies to BIAP service. CCIA and many others have been equally clear, however, in explaining that not all of Title II must apply to broadband Internet access service.³⁸ Forbearance is a well-used tool for cutting away any telephone-era regulation that has no reasonable application.³⁹ CompTel, the Consumer Federation of America, and the New America Foundation have proposed the same solution.⁴⁰ Title II

³⁵ Verizon Comments at 47.

³⁶ CCIA Comments at 30.

³⁷ *See id.* at 10 & n.39 (quoting *Verizon v. FCC*, 740 F.3d 623, 649-51, 659 (D.C. Cir. 2014)).

³⁸ CCIA Comments at 9 (“... does not mean, however, that the entirety of Title II must be imposed, ceaselessly, on broadband Internet access.”).

³⁹ Sections 201, 202, and 208 are the most necessary provisions of Title II for establishing the Commission’s authority. *See* CCIA Comments at 31; *see also* CompTel Comments at 22. Section 254 also must be retained, because it is the authority by which the FCC can devote Universal Service Fund money for broadband services. *See* CompTel Comments at 22 (“Likewise, retaining Section 254 will allow the Commission to ensure regulatory parity in USF contributions and promote support for Internet connectivity.”).

⁴⁰ “For example, the Commission can protect consumers and promote fair competition by retaining Sections 201, 202, and 208. Likewise, retaining Section 254 will allow the Commission to ensure regulatory parity in USF contributions and promote support for Internet connectivity.”

classification is not, for this service, an all-or-nothing approach. Anyone who suggests otherwise is employing hyperbole and misstating the position.

B. Section 706 Can Be an Additive, But Not Sufficient, Basis of Authority

As CCIA has stated, Section 706 has been “twice rejected” as the statutory basis for the rules that the FCC knows are necessary.⁴¹ Its mandate “is about fostering infrastructure investment” rather than the “nondiscriminatory operation of facilities once they are deployed.”⁴² The Commission’s own call for comment regarding Section 706 reveals that provision’s lack of connection to the task at hand.⁴³

Other parties have reached similar conclusions. Public Knowledge states that “[a]ny rules that effectively protect the open Internet from discrimination or blocking by ISPs under 706 authority are ... unlikely to withstand court scrutiny.”⁴⁴ Free Press concludes that “Section 706 simply fails to give the Commission the authority to do what the Chairman says the Notice will do.”⁴⁵ And having reviewed the opinions of the D.C. Circuit, the New America Foundation calls reliance on Section 706 “legally risky.”⁴⁶

As such, Section 706 can be an additive, but not the sole, basis of authority. The Consumer Federation of America observes that “there is no legal conflict in simultaneously

CompTel Comments at 22; *see also* New America Foundation Comments at 25; CFA Comments at 81 (“[T]he use of Title II authority should be selective and targeted. The Communications Act gives it the flexibility to do in the form of regulatory forbearance (section 10).”).

⁴¹ CCIA Comments at 10.

⁴² *Id.* at 10-11.

⁴³ *Id.* at 11 (quoting NPRM ¶¶ 99, 144, 147).

⁴⁴ Public Knowledge, *et al.* Comments at 32.

⁴⁵ Free Press Comments at 128.

⁴⁶ Comments of New America Foundation at 20.

exercising section 706 authority and Title II authority.”⁴⁷ NTCA aptly states that section 706 “offers the Commission the authority to impose obligations where needed to preserve the openness of the Internet in the context of accelerating broadband deployment.”⁴⁸ The Commission should make explicit, however, the portions of the rules that stem from section 706 and those which rest on Title II. For as the Consumers Union explains, Section 706, being something other than common-carrier regulation, would require the FCC to review BIAP conduct only in “case-by-case analysis” which “is not enough by itself to protect an Open Internet.”⁴⁹

CCIA reminds the Commission that, contrary to Comcast’s and AT&T’s creative interpretation, the D.C. Circuit was extremely harsh in rejecting section 706 as authority for adopting anti-blocking and anti-discrimination rules. Comcast asserts that the *Verizon* decision gives “a clear roadmap for the Commission to promulgate sensible and legally sound open Internet rules pursuant to Section 706.”⁵⁰ But the Court also noted that the non-discrimination rule absolutely constitutes common-carrier regulation,⁵¹ and thus section 706 cannot support it.⁵² AT&T’s argument takes the form of an irrelevant hypothesis: “User-directed prioritization, as distinct from paid prioritization arrangements, would remain permissible. The Commission has

⁴⁷ Consumer Federation of America Comments at 4.

⁴⁸ NTCA Comments at 14.

⁴⁹ GN Docket No. 14-28, Comments of Consumers Union at 7 (July 15, 2014).

⁵⁰ Comcast Comments at 13.

⁵¹ “We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has “relegated [those providers], *pro tanto*, to common carrier status.” *Verizon*, 740 F.3d at 655.

⁵² See Free Press Comments at 132 (“It’s hard to contemplate how any real no-blocking rule would *not be considered* common carriage, and in all likelihood even the no-blocking rule in the Notice would suffer the same fate as the one which came before.”).

statutory authority under section 706 to regulate paid prioritization in this manner.”⁵³ That hypothesis says nothing to the actual focus of this docket: paid prioritization arrangements that BIAPs can extract from content providers by virtue of their exclusive control of end users. Neither Comcast nor AT&T have a colorable argument that section 706 can stand alone.

III. THE RECORD SUPPORTS ADOPTION OF RULES PROHIBITING BLOCKING AND DISCRIMINATION

In response to the NPRM’s invitations,⁵⁴ CCIA has called for rules prohibiting BIAPs from “impeding, in any way and to any degree, the free transmission of Internet platforms, services, and applications that are retrieved or uploaded by their end users.”⁵⁵ These rules should include “a No-Blocking Rule that prohibits private agreements that are obtained via unreasonable dealing or on unreasonable terms,”⁵⁶ and a No-Discrimination Rule stating that BIAPs will not be “permitted to give favorable treatment to any platforms, applications, or source.”⁵⁷ Affirmative rules are necessary; attempts to set merely a baseline of “minimum level of access” will fail and be of no help.⁵⁸

A. The Record Supports an Affirmative No-Blocking Rule Rather Than Simply Establishing a “Minimum Level of Service”

As CCIA has stated, and the NPRM suggests, the blocking issue is more a question whether BIAPs should be permitted to create “side-deals” (or “individualized bargaining”) with

⁵³ AT&T Comments at 32.

⁵⁴ NPRM ¶¶ 93-96 (proposing anti-blocking measures); *id.* ¶ 111 (proposing measures to address discrimination).

⁵⁵ CCIA Comments at 13.

⁵⁶ *Id.* at 19.

⁵⁷ *Id.* at 19.

⁵⁸ *Id.* at 18; *see also* NPRM ¶¶ 97-101.

content providers.⁵⁹ The “Zero-Sum-Game” of Internet transmission, caused by the natural scarcity of facilities, means that the favorable treatment of certain data streams necessarily results in less favorable treatment of other data streams.⁶⁰ As to that point there is and can be no reasonable dispute. Yet some individualized agreements “truly are mutually voluntary and advantageous for the BIAP, content provider, and consumers.”⁶¹ As such, a bright-line, *per se* rule would be unwise. CCIA therefore seeks a rule that would prohibit BIAPs from making “[d]eals that are forced upon or extorted from content providers, or are provisioned under discriminatory terms and conditions.”⁶²

In addition, given that anticompetitive conduct and discrimination would simply migrate upstream if the No-Blocking and No-Discrimination rules did not cover points of interconnection, the Commission should state explicitly that they apply throughout the network, including at points of interconnection which are “are key parts of” Internet transmission paths.⁶³

⁵⁹ CCIA Comments at 14; NPRM ¶ 93.

⁶⁰ CCIA Comments at 15.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 29. “BIAPs should be fully accountable for all segments of the Internet transmission paths that they own or control.” *Id.* at 30; *see also* CompTel Comments at 26-27 (“The same economic forces that threaten the openness of consumer’s last-mile broadband connection are present at the point of interconnection With monopoly power, broadband providers can exact tolls at the point of interconnection to ensure there is adequate capacity to deliver traffic to end users at the speeds for which they pay. Increasingly, certain last-mile providers are exercising [that] power by requiring transit or edge providers to pay for direct interconnection to ensure that the Internet service their end users pay for adequately delivers the content they desire.”); Netflix Comments at 17 (“terminating ISPs cannot charge data sources for interconnection and must provide adequate no-fee interconnection to wholesalers and Internet services so consumers experience the broadband speeds for which they have paid.”); GN Docket No. 14-28, Comments of Internet Association at 22 (July 14, 2014) (“[I]nterconnection should not be used as a choke point to artificially slow traffic or extract unreasonable tolls from over-the-top providers. If this were to occur, interconnection fees could create the same consumer harms as paid prioritization in the last mile.”); GN Docket No. 14-28, Comments of Cogent Commc’ns Group, Inc. at 14 (July 15, 2014)

Side agreements should not be permitted if they are extorted through the threatened or actual degradation of transmissions or are obtained through abuse of the market power BIAPs hold by virtue of their bottleneck control over the last mile.⁶⁴ CCIA also agrees with the comments from the New America Foundation and the Benton Foundation who argue that if the interconnection fees BIAPs charge are “merely tolls for access to the last-mile ISPs subscribers, then prohibiting them should fall squarely within this proceeding’s scope”⁶⁵ and “they should be banned under the Commission’s rules.”⁶⁶ This approach is well supported in the record, even by Comcast to some degree.

As stated previously, CCIA believes that there can and will exist various types of interconnection agreements between various parties and BIAPs that will be seen to be in the public interest.⁶⁷ The significant market power of the BIAPs requires, however, that they bear the burden of proof that agreements are neither discriminatory nor anticompetitive; the burden should never fall on the other contracting party (for example, an edge provider) or on the consumer.

Putting the onus on edge providers, most of whom lack regulatory and legal experience anywhere comparable to that of BIAPs, to show anticompetitive conduct through individual administrative proceedings will almost certainly lead to a situation where edge

(“No matter how ‘minimum level of access’ is defined, if last-mile broadband ISPs are able to allow the interconnection points with other networks to become congested to the degree that bandwidth-intensive content cannot be sufficiently transmitted to the ISPs’ customers, then the requirement will be meaningless.”).

⁶⁴ CCIA Comments at 17.

⁶⁵ New America Foundation Comments at 14-15.

⁶⁶ *Id.* at v.

⁶⁷ CCIA Comments at 15 (“some side-deals truly are mutually voluntary and advantageous for the BIAP, content provider, and consumers.”).

providers (particularly startups and smaller companies) cannot avail themselves of the protections provided in this rulemaking.

As Netflix points out:

ISPs generally have existing regulatory personnel and are large enough and entrenched enough to see an advantage in a long, drawn out regulatory process. By contrast, edge providers (particularly smaller companies and start-ups) often lack any regulatory expertise, let alone a budget sufficient to spend years arguing in front of the Commission. **Weighing the cost of an administrative proceeding and the uncertainty of success, many edge providers likely will choose to forego engagement with the Commission.**⁶⁸

Comcast supports a similar concept in which “[a] broadband provider seeking to justify any ‘paid prioritization’ arrangement could be required to bear the burden of showing that the arrangement is commercially reasonable *and fair to consumers and edge providers.*”⁶⁹ The Consumer Federation of America supports this rule as well. It sets forth five criteria for identifying a permissible individualized agreement: “Not degrade the service of the general public[;] Non-exclusive[;] Not anticompetitive[;] Non-discriminatory[;] Demonstrate a need for differentiation based on cost or quality of service[.]”⁷⁰ In sum, the “rule should have the effect of ensuring that the data traffic flows *during any negotiations* over rates, terms and conditions.”⁷¹

As CCIA has stated, it is leery of the proposed “commercially reasonable standard”, standing alone, for reviewing suspect agreements.⁷² It is vague and unworkable. Commenters

⁶⁸ Netflix Comments at 10 (emphasis added).

⁶⁹ Comcast Comments at 24 (emphasis added).

⁷⁰ CFA Comments at 71.

⁷¹ *Id.* at 70 (emphasis added).

⁷² CCIA Comments at 16.

other than BIAPs and their allies are uniformly critical of it.⁷³ Indeed, this standard has failed to achieve its intended goals even in the far simpler context of data roaming.⁷⁴

As the Internet Association stated:

[The commercially reasonable standard] proposes a difficult to enforce, multi-factor framework that is not focused on the goals of broadband deployment and adoption; that provides insufficient business certainty for broadband [IAPs] or online applications and services; and that could lead to overreaching regulatory intervention by the Commissions.⁷⁵

Free Press raised similar objections:

[It is] unfathomable that the Commission thinks an amorphous, poorly defined and untested standard that requires parties to negotiation before they complain – then undertake the expense of securing counsel and filing a complaint, then waiting for the Commission to rule – can provide small edge companies any certainty.⁷⁶

The National Association of State Utility Consumer Advocates (“NASUCA”) also criticized the “commercially reasonable” construct as being a “weak standard for network-wide anti-discrimination,” largely because it “is a *post facto* determination incapable of preventing harm.⁷⁷ eBay, like CCIA,⁷⁸ noted that this standard necessarily will increase the costs of seeking

⁷³ Internet Association Comments at 16; GN Docket No. 14-28, Comments of eBay at 4-5 (July 15, 2014); Consumers Union Comments at 7 (“This approach provides no meaningful certainty and will only favor the largest incumbents with the most resources who already have unequal bargaining power and dominant market power over consumers.”); Free Press Comments at 136-37 (“This regime would shift the burden to prove such practices commercially unreasonable onto Internet users and edge providers who can least afford to bear that burden.”).

⁷⁴ See generally WT Docket No. 05-265, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc. (May 27, 2014).

⁷⁵ Internet Association Comments at 16.

⁷⁶ Free Press Comments at 141-42.

⁷⁷ NASUCA Comments at 15-16.

relief from unlawful BIAP conduct⁷⁹ and thus will contravene the Commission’s stated goal of providing meaningful enforcement measures to small businesses.

In addition, the “minimum level of access” idea is no replacement for an affirmative No-Blocking Rule. It is impossible to quantify, as needs must, a baseline bandwidth level for broadband Internet access in this fast-changing market, and any attempt to set a baseline figure would “trigger a ‘race to the bottom’” among the dominant BIAPs.⁸⁰ Nor can the Commission simply rely on the notion of “‘best efforts’ traffic delivery”⁸¹ as a substitute for a rule that could apply to individualized agreements. That term may represent, as Comcast asserts, a “well-understood engineering concept,”⁸² but it says nothing to the actual terms or conditions of the agreements themselves. Nor, as Comcast describes it, would “best efforts traffic delivery” prevent BIAPs from affecting their carriage of an edge provider’s content pending the supposed “arms-length” negotiations.⁸³

Therefore, the Commission should adopt a No-Blocking Rule that prohibits individualized agreements that are obtained via actual or threatened inferior treatment or that contain obviously punitive terms and pricing.

B. BIAP Discrimination in Favor of Particular Content or Sources Should Be Prohibited

As CCIA has stated, an Anti-Discrimination Rule is the other necessary component

⁷⁸ CCIA Comments at 31.

⁷⁹ eBay Comments at 4-5.

⁸⁰ CCIA Comments at 18.

⁸¹ Comcast Comments at 20.

⁸² *Id.*

⁸³ CCIA Comments at 17 (citing NPRM ¶ 141 (quoting AT&T Comments at 3)).

of meaningful Open Internet protections.⁸⁴ “BIAPs must not be permitted to discriminate against any platforms, applications, or source”⁸⁵ – actions which, as the nation has seen, they have both the means and incentive to undertake. That means paid prioritization must be presumptively unlawful, for it discriminates not only against edge providers but also from among broadband end users themselves.⁸⁶

The danger of paid prioritization will visit small businesses especially severely. If the FCC were to allow paid prioritization and BIAPs began to charge “tolls” – be they in the form of mandatory purchase of dedicated facilities or simply a use-based fee – not just to Netflix, but to other edge providers, small businesses likely could not pay them.⁸⁷ The i2Coalition stated in its comments that this “preferential treatment” for certain edge providers would dramatically skew the level playing field, and “start-ups that require priority service may not be able to bring their product to market without significant outside investment and investors will be affected by the increased equity needs of entrepreneurs.”⁸⁸ In addition, Foursquare, along with several other successful Internet start-ups, met with the Commission to explain why these companies must be able to continue to innovate on the Internet without having to ask for permission from BIAPs.⁸⁹

Finally, paid prioritization also will harm consumers. CompTel notes that, BIAP promises to the contrary, “tolls” that are extracted from edge providers necessarily will be passed

⁸⁴ CCIA Comments at 19-20.

⁸⁵ *Id.* at 19.

⁸⁶ *Id.*

⁸⁷ eBay Comments at 4.

⁸⁸ i2Coalition Comments at 10.

⁸⁹ GN Docket 14-28, Notice of *Ex Parte*, Etsy, Tumblr, Kickstarter, Foursquare, Meetup, *et al.* (July 17, 2014).

through to consumers.⁹⁰ This obvious danger should, in itself, persuade the Commission to monitor individualized agreements very carefully and adopt strict criteria for determining whether they are permissible.

IV. PROPOSED EXEMPTIONS SHOULD BE NARROWLY DRAWN

The Open Internet rules should apply to the transmission component of broadband Internet access service in an even-handed and technologically neutral manner.⁹¹ As such, the exemptions that the Commission appears inclined to grant must be clearly defined and the rules should have the broadest application possible.

Specifically, the so-called “Specialized Services” exemption is cause for concern. CCIA has stated that no reasonable definition of “Specialized Services” is possible, and that the Commission’s resources would be better devoted to locking down the “reasonable network management” standard⁹² as the means by which BIAPs can justify any challenged conduct.⁹³ Verizon agrees. It notes that “[s]pecialized services are by definition distinct from the customer’s broadband Internet access service – they merely supplement such service, increasing the range of options available to the consumer and expanding consumer welfare.”⁹⁴ But as to a formal definition, Verizon advises that “[t]he Commission ... should refrain from further defining

⁹⁰ CompTel Comments at 10.

⁹¹ *See generally* CCIA Comments at 22-30.

⁹² CCIA has proposed that “reasonable network management” should “not allow a BIAP to impose its own commercial preferences or ownership affiliations with respect to data sources or content in the guise of making network engineering decisions.” CCIA Comments at 24.

⁹³ *Id.* at 28.

⁹⁴ Verizon Comments at 76.

specialized services while they are still in their infancy.”⁹⁵ On this point, it seems the best one can say is “I know it when I see it,” a standard that obviously is impossible to apply.

V. THE RECORD SHOWS THAT ROUTINIZED ENFORCEMENT MECHANISMS MUST BE ADOPTED FOR THE FORTHCOMING RULES

CCIA has stated that the forthcoming rules should include enforcement measures that “hav[e] the force of law and *stare decisis* effect” in order to achieve the Commission’s goal of “legal certainty”.⁹⁶ The record shows that CCIA’s request is sound.

The Consumer Federation of America asks that the enforcement “process must be structured and recognized by the FCC to ensure that it is representative, transparent, and effective.”⁹⁷ These goals will not be met using the “case-by-case” approach suggested in the NPRM⁹⁸ which “provides no meaningful certainty and will only favor the largest incumbents with the most resources who already have unequal bargaining power and dominant market power over consumers.”⁹⁹

The comments of the BIAPs on this issue are alarming. Comcast wants “self-initiated investigations” to be among the approved enforcement mechanisms, along with “[a] business-review-letter process, non-binding staff opinions, or enforcement advisories.”¹⁰⁰ Verizon boldly declares that “[T]he Commission could act as a ‘backstop’” in the enforcement process.¹⁰¹ These comments reveal the continued antipathy of BIAPs to the adoption of any effective Open

⁹⁵ Verizon Comments at 77.

⁹⁶ CCIA Comments at 31 (quoting NPRM ¶ 163).

⁹⁷ CFA Comments at 69.

⁹⁸ NPRM ¶ 168.

⁹⁹ Consumers Union Comments at 7.

¹⁰⁰ Comcast Comments at 67-69.

¹⁰¹ Verizon Comments at 18.

Internet protections. They should persuade the Commission to choose enforcement mechanisms that will have real and lasting effect on how BIAPs deliver Internet access service to the American public.

CONCLUSION

CCIA urges the Commission to reclassify broadband Internet access services as Title II telecommunications and adopt both a No-Blocking and a No-Discrimination rule, along with an enhanced Transparency Rule, that are enforceable via established section 208 procedures and having both binding and precedential effect.

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